The *Wynne* Soap Opera: Will It Be Renewed for a Third Season?

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In this article, the authors review the U.S. Supreme Court's decision in *Comptroller of the Treasury v. Wynne* and the Maryland Court of Appeals' decision in *Wynne v. Comptroller of the Treasury* and discuss the possibility of a third case.

COVID-19 may have halted production of daytime TV,[1] but it has not stood in the way of the ongoing soap opera that is Maryland's litigation with Brian and Karen Wynne. The first season of *Wynne* was a smash hit, culminating in an exciting finale in which the Supreme Court held that Maryland's personal income tax regime was in violation of the dormant commerce clause in 2015's *Comptroller of the Treasury v. Wynne* (*Wynne I*).[2]

The second season of *Wynne* just reached its conclusion with the Maryland Court of Appeals' June 5 decision in *Wynne v. Comptroller of the Treasury* (*Wynne II*). In *Wynne II*, the court of appeals held that Maryland did not violate the dormant commerce clause by statutorily reducing the overpayment interest due on refunds owed as a result of the holding in *Wynne I*.

However, *Wynne II* may not be the end of the story. As explained in more detail below, Maryland's statutory reduction to overpayment interest likely violates due process as construed by the Supreme Court in *Reich v. Collins*. The Maryland Court of Appeals did not address this question in *Wynne II*, so there is a chance that *Wynne* will be renewed for a third season.

I. Recap of *Wynne I*: The Dormant Commerce Clause and Internal Consistency

Like the beginning of any good sequel, we begin with a brief recap. If you are well versed in the comptroller of Maryland/Brian and Karen Wynne saga, this is where you hit "skip recap" and move to Section 2. Otherwise, here is some historical perspective.

In 2006 two Maryland residents, Brian and Karen Wynne, filed a Maryland income tax return on which they claimed a credit for income taxes paid to other states. At the time, Maryland law allowed a credit against the state income tax for income taxes paid to other states, but it did not allow a similar credit against the county income tax.[3]

In response to the return, the comptroller assessed a tax deficiency, denying the Wynnes a credit against the county income. The Wynnes appealed the assessment but paid the assessed tax under protest during the pendency of the appeal. This put the Wynnes' claim into a refund posture

[1] *See* Jonathan Berr, "Will the Coronavirus Kill the Daytime Soap Opera?" *Forbes*, Apr. 30, 2020.

[2] 575 U.S. 542 (2015).

[3] Md. Code Ann. Tax-Gen. section 13-703(b).

and began the accrual of statutory overpayment interest.[4]

The Maryland Tax Court affirmed the assessment, but that decision was eventually overturned when the Maryland Court of Appeals agreed with the Wynnes that the lack of a credit against the county tax for income taxes paid to other states under Maryland's income tax regime discriminates against interstate commerce in violation of the commerce clause of the U.S. Constitution.[5]

The first season finale started with a shocking twist: While Maryland filed a certiorari petition as expected, the federal government filed an amicus brief in support of the state's petition.[6] In its amicus brief, the federal government posited a novel theory: Even though Maryland's tax discriminated against interstate commerce, the dormant commerce clause does not protect a state's own citizens from discrimination.[7] Perhaps swayed by the federal government's brief, the Supreme Court granted certiorari.

The finale concluded with a nail-biter: In a 5-4 decision, the Supreme Court held for the taxpayers and confirmed that Maryland's tax violated the dormant commerce clause.[8] The decision in *Wynne I* was heralded for reinvigorating the internal consistency doctrine.[9] However, the principal reason the viability of the doctrine was in any doubt was the Court's decision to grant certiorari in the first place.

II. *Wynne II*: The Dormant Commerce Clause and the Right to Statutory Overpayment Interest

The second season of *Wynne* started with a flashback. After the court of appeals decision in *Wynne I* but before the Supreme Court granted certiorari, the Maryland General Assembly passed legislation providing that if the U.S. Supreme Court declined to hear *Wynne I* or ruled against the state, the interest rate payable on the applicable refunds would retroactively change from 13 percent and become "a percentage, rounded to the nearest whole number, that is equal to the average prime rate of interest quoted by commercial banks to large businesses during fiscal 2015, based on a determination by the Board of Governors of the Federal Reserve Bank."[10]

Put another way, in anticipation of losing, Maryland's General Assembly changed the rules, but only if the state lost. The Wynnes challenged this change on the grounds that the statutory reduction to overpayment interest violated the commerce and due process clauses.

In a brief order, the tax court agreed with the Wynnes that Maryland's reduction in the interest rate violated the commerce clause and declined to address the other issues raised in the taxpayers' challenge.[11] Maryland appealed.

On June 5 the Maryland Court of Appeals issued its decision in *Wynne II*, holding that Maryland did not violate the dormant commerce clause by statutorily reducing the overpayment interest due on refunds in accordance with the Supreme Court's decision in *Wynne I*.[12] The court rejected the taxpayers' argument that reducing overpayment interest only for claims in accordance with *Wynne I* necessarily discriminated against interstate commerce, simply because only taxpayers involved in interstate commerce would have a claim under *Wynne I*. The court stated that "there is a fundamental difference between a tax and the rate of interest that may be paid on a tax refund,"[13] and it reasoned that the difference in interest rates did not violate the commerce clause because it did not "alter the competitive balance for interstate investment."[14]

[4] Md. Reg. section 03.01.01.04.H.(3)(a)(iii).

[5] *Comptroller of the Treasury v. Wynne*, 431 Md. 147, 169 (2013).

[6] Brief for the United States as Amicus Curiae, *Comptroller of the Treasury v. Wynne*, 575 U.S. 542 (Apr. 4, 2014).

[7] *Id.* at 9. In support of this theory, the federal government cited dicta from the Supreme Court's decision in *Chickasaw Nation* for the proposition that a sovereign can tax "all income of their residents." *Id.* (citing *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 463 n.12 (1995)). However, the language in *Chickasaw Nation* was inapposite: In *Chickasaw Nation*, the Court was addressing fully sovereign nations, not quasi-sovereign states that are bound by the commerce clause.

[8] 575 U.S. 542 (2015).

[9] *See, e.g.*, David Sawyer and Amy Hamilton, "News Analysis: *Wynne* Answers 1 Question but Raises Many More," *State Tax Today*, June 1, 2015.

[10] *Id.*

[11] *Wynne v. Comptroller*, No.16-IN-OO-0216 (Md. Tax Ct. May 23, 2018).

[12] *Wynne v. Comptroller*, No. 12, September Term 2019 (Md. June 5, 2020).

[13] *Id.* at 24.

[14] *Id.* at 29.

III. *Wynne III*? Due Process and the Right to Statutory Overpayment Interest

On its face, the Maryland Court of Appeals' decision in *Wynne II* purported to dispose of all issues in the case. It is not necessarily the series finale, though. Regardless of whether the court of appeals' commerce clause analysis in *Wynne II* was correct, Maryland's midcourse reduction of overpayment interest was likely inconsistent with the due process clause of the 14th Amendment.[15]

In its decision, the Maryland Court of Appeals sidestepped the due process issue by observing that the Supreme Court's decision in *McKesson* "did not suggest that interest was a required element of such a refund" and pointing out that the taxpayers' counsel had conceded at argument that Maryland's statute "satisfied the requirements of *McKesson*."[16] However, that does not dispose of the due process issue: While *McKesson* is an important due process precedent, it is not the only case that establishes a due process requirement for a state's tax procedure.[17] Indeed, the Supreme Court observed in *McKesson* that there are numerous precedents prohibiting the deprivation of property without due process.[18]

The Supreme Court precedent most on point with the due process issue in *Wynne II* is *Reich v. Collins*.[19] The take-away from *Reich* is clear — a state cannot "'bait and switch' by reconfiguring" its refund procedure "unfairly, in mid-course."[20] Just like *Wynne II*, *Reich* was a follow-up to a Supreme Court decision, *Davis v. Michigan Department of Treasury*.[21] In *Davis*, the Supreme Court had held that states cannot provide tax exemptions to state retirees without providing exemptions to similarly situated federal retirees.[22]

The taxpayer in *Reich* was a federal retiree who had filed a refund claim in Georgia on the same theory presented in *Davis*.[23] The plain language of Georgia's statute seemed to expressly allow taxpayers to pay tax and file refund claims to recover tax overpayments, with no restrictions on constitutional claims.[24] However, when the taxpayer's refund reached the Georgia Supreme Court, the court denied the taxpayer's refund claim on the novel grounds that Georgia's refund statute did not apply when a tax was imposed under an unconstitutional statute.[25]

The Supreme Court granted certiorari, vacated the Georgia Supreme Court's decision, and remanded. On remand, the Georgia Supreme Court doubled down: It held that the state did not violate due process because the taxpayer could have underpaid the tax at issue and challenged its validity in a pre-deprivation hearing.[26]

The Supreme Court once again granted certiorari. This time, the Court reversed the Georgia Supreme Court in a decision that expressed about as much wrath as possible for a tax case. The Court held that Georgia violated due process by "appear[ing] to hold out a 'clear and certain' post-deprivation remedy," and then limiting that remedy on unexpected grounds.[27] While acknowledging that *McKesson* provided the state with flexibility in designing a "clear and certain" remedy, the Court placed limits on this flexibility.[28] The Court stated that "what a State may *not* do, and what Georgia did here, is to reconfigure its scheme, unfairly, in *mid-course to* 'bait and switch.'"[29]

The facts relevant to the due process inquiry in *Wynne II* are simple. At the time that the taxpayers in the case paid tax to Maryland, the state statute provided that the rate of interest for overpayments was 13 percent.[30] Later, Maryland's General Assembly changed the law to

[15] The only question before the court was whether the reduction to interest violated the dormant commerce clause, as this was the only grounds for the Maryland Tax Court's decision. *Wynne v. Comptroller*, No.16-IN-OO-0216 (Md. Tax Ct. May 23, 2018).

[16] *Wynne II*, slip op. at 19, n.26.

[17] It should also be noted that the authors of this article do not agree with the Maryland Court of Appeals' characterizations of *McKesson*.

[18] The "exaction of a tax constitutes a deprivation of property," and the due process clause requires states to provide procedural safeguards against illegal exactions. *McKesson* at 36 (1990).

[19] 513 U.S. 106 (1994).

[20] *Id.* at 111 (1994).

[21] 489 U.S. 803 (1989).

[22] *Id.* at 818.

[23] *Reich*, 513 U.S. at 108.

[24] *Id.* at 109 (citing Ga. Code Ann. section 48-2-35(a) (Supp. 1994)).

[25] *Reich v. Collins*, 262 Ga. 625, 629 (1992).

[26] *Reich v. Collins*, 263 Ga. 602, 604 (1993).

[27] *Reich*, 513 U.S. at 112-13.

[28] *Id.* at 110-11.

[29] *Id.* at 111 (emphasis in original).

[30] Md. Code Ann. Tax-Gen. section 13-604(b), enacted in 2006.

retroactively reduce the interest rate payable on overpayments resulting from the holding in *Wynne I*.[31]

Maryland's reduction to the statutory interest rate closely parallels Georgia's action in *Reich* and is just as problematic from a due process perspective. Maryland held out a "clear and certain" refund procedure (that is, a refund of tax plus 13 percent interest), then — out of fear that the Supreme Court would reach the same conclusion as the Maryland Court of Appeals — changed its refund procedure in a way that was prejudicial to taxpayers. Indeed, Maryland's interest rate reduction has the hallmarks of a classic bait and switch. Therefore, the interest rate reduction was likely inconsistent with due process.

Of course, there are some distinctions between *Wynne II* and *Reich*. One distinction is that *Wynne II* involved only the question of the amount of interest due on a refund, while *Reich* involved the question whether the taxpayer was entitled to a refund at all. However, this should be a distinction without a difference. The Supreme Court's decision in *Reich* was not predicated on the scale of the bait and switch; a bait and switch is a bait and switch, regardless of its scale. Once a state puts a post-deprivation procedure in place, *Reich* requires that the state abide by that procedure.[32]

Another distinction between *Wynne II* and *Reich* is that *Wynne II* involved a statutory change, while *Reich* involved a novel judicial construction of an existing statute. While the Supreme Court in *Reich* had to probe Georgia's statute to determine how the "average taxpayer" would have interpreted the statutory language,[33] there is no need to go through a similar parsing exercise here. The Maryland General Assembly explicitly changed the law governing overpayment interest to reduce the financial impact of an adverse judicial decision. If anything, this distinction makes the due process violation in *Wynne II* more egregious than in *Reich*.

In light of the substantial due process concerns implicated by the General Assembly's reduction to overpayment interest, it seems likely that *Wynne* will be back for a third season. Although it is now too late for the Wynnes to request that the court of appeals grant reconsideration and remand for further proceedings on the due process issue,[34] they could still file a petition for writ of certiorari with the clerk of the U.S. Supreme Court.[35] Or, another taxpayer may take up the mantle of the due process challenge. Either way, we eagerly await to see if there will be a season three. ■

[31] 2014 Maryland Laws Ch. 464 (S.B. 172, section 16).

[32] Another way to reach this conclusion is as a corollary to *Reich*. In *Reich*, the Court acknowledged that a state does not need to allow taxpayers to file refund claims, but it reasoned that once a state enacts a refund procedure, due process requires the state to follow that procedure. Similarly, a state may not have an obligation to provide interest on overpayments — *see, e.g.*, *Chicago Freight Car Leasing Co. v. Limbach*, 584 N.E.2d 690, 694-95 (Ohio 1992) — but once it enacts a statute providing for interest on overpayments, due process requires the state to pay such interest.

[33] *Reich*, 513 U.S. at 111.

[34] Maryland Rule 8-605(a) requires the filing of motions for reconsideration before the earlier of the issuance of the mandate or within 30 days after the filing of the court's opinion. The Maryland Court of Appeal issued the mandate in *Wynne II* on July 6, 2020.

[35] 28 U.S.C. section 2101(c) and Supreme Court Rule 13.1.